COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

November 26, 2008

In the Matter of

Somerset Power LLC

DEP Docket No. 2008-054

Final Decision on Motion for Reconsideration

The Southeast Regional Office of the Department of Environmental Protection approved a proposal by Somerset Power LLC to convert to plasma gasification technology as a fuel source at the Somerset Station electrical generating facility in Somerset, Massachusetts. The Conservation Law Foundation and twelve citizens (the "Petitioners") filed an appeal, claiming that the approval would result in higher emissions than allowed under a condition in the original approval. In a Final Decision, I adopted the Recommended Final Decision of the Presiding Officer dismissing the appeal on the grounds that the Petitioners had not stated a claim on which relief could be granted and for lack of standing. The Petitioners seek reconsideration of the Final Decision. I have considered the arguments of the parties and decline to reconsider the Final Decision. No ruling of law or finding of fact is clearly erroneous, the standard for reconsideration under the regulations. 310 CMR 1.01(14)(d).

As to the failure to state a claim, the Petitioners reargue their position that specific language in the original (2002 and 2003) approvals precludes the Department's 2008 approvals. The identical language appears in both the original and the 2008 approvals, and simply states that the requirements of 310 CMR.7.29 may not provide grounds for evading more stringent requirements in other regulations or prior approvals.[1] The paragraph on amendments contains no limitations, except to the procedure to be followed. See 310 CMR 7.29(6)(h); Emission Control Plan Final Approval, Section 6 (June 7, 2002); Recommended Final Decision at 6-7. Accordingly, I find no error of fact or law.[2]

The Petitioners argue that the Recommended Final Decision contains an error of fact in its statement that Salem Harbor Station was not in compliance with the emission standards at 310 CMR 7.29. It is clear from the citation and the earlier background on the promulgation of the regulations that there was no error of fact and the circumstances of Salem Harbor and Somerset warranted differing outcomes. Recommended Final Decision at 2-3 and 7-8.

The Petitioners claim that the Department has failed to minimize damage to the environment by not requiring a full best available control technology analysis that would have been required if there had been a "repowering" of the facility. There is no error of

[1] The provision cited by the Petitioners states: "Applicable requirements and limitations contained in 310 CMR 7.29 shall not supersede, relax or eliminate any more stringent conditions or requirements (e.g., emission limitation(s), testing, record keeping, reporting, or monitoring requirements) established by regulation or contained in a facility's previously issued source specific Plan Approval(s) or Emission Control Plan(s)." If the Department had intended to impose the "anti-backsliding" condition claimed by the Petitioners, the subject of this sentence would refer to the amended approval rather than to 310 CMR 7.29.

[2] As to the discussion of dismissal for failure to state a claim in the Recommended Final Decision, issued on June 13, 2008, see also, Iannacchino v. Ford Motor Co., Docket SJC-10059 (June 13, 2008).

fact or law, given that the conversion of Boiler 8 to syngas was not a "repowering" and will result in no potential increase of any air contaminant. See 310 CMR 7.02.

The Petitioners claim that the Recommended Final Decision did not address all pollutants emitted by Somerset Station, with the exception of carbon dioxide. The Recommended Final Decision clearly stated that the original approvals mirrored the emissions limitations established in the regulations, while the 2008 amendment showed "substantial reductions, ranging from 51% for nitrogen oxides to 86% for sulfur dioxide, while carbon dioxide shows a lesser reduction of 6.1%." Recommended Final Decision at 4. Because the reduction for carbon dioxide was less than other pollutants and the Petitioners devoted much of their claims to carbon dioxide, both the Recommended and Final Decisions correspondingly placed more emphasis on carbon dioxide emissions. The Petitioners now claim that emissions of volatile organic compounds and carbon monoxide will increase, but have provided no support for this claim. A comparison of the original and 2008 approvals show no increase in emissions that might suggest an error of fact or law.

The Petitioners claim that the Commissioner's Final Decision, which recognizes the recent passage of legislation to address carbon dioxide emissions, is itself inconsistent with the Global Warming Solutions Act. The Petitioners suggest that the Act signals a move away from the market-based approach of the Regional Greenhouse Gas Initiative. I disagree, but as the Petitioners correctly note the Act does not apply to this approval and provides no basis for reconsideration.

As to the dismissal for lack of standing, the Recommended Final Decision did not err by reviewing adjudicatory decisions from other regulatory programs. The Presiding

Officer provided a rather comprehensive survey of the Department's past practice as to standing. There is no question that in the absence of appeal provisions in the regulations of the substantive program, the procedural provisions of 310 CMR 1.01(7)(d) and (f) apply. The provisions in 310 CMR 1.01(7)(d) and (f) reflect the requirements of M.G.L. c. 30A. The recitation of events in the Motion for Reconsideration demonstrates there was no error of fact. The Department followed its procedures for modifications as set forth in the original approvals, by publishing a notice allowing a 30 day public comment period and electing to hold a public hearing, in accordance with M.G.L. c. 30A.[3] The Conservation Law Foundation and one member of what became the Twelve Citizens were among the many individuals and groups who attended the public hearing at the Somerset Public Library and submitted comments on the draft approvals.

The notice of claim filed by the Conservation Law Foundation and the Twelve Citizens under 310 CMR 1.01(7)(d) and (f) respectively after the permit was issued must be dismissed because no one with a right to initiate an adjudicatory appeal had filed a notice of claim under 310 CMR 1.01(6)(a). See also 310 CMR 1.01(1)(c)Adjudicatory Appeal. The question of whether either the Conservation Law Foundation or the Twelve Citizens could have intervened is academic. As discussed in the Recommended Final Decision, there is an important distinction between intervention and a right to appeal, and this case also illustrates the distinction between participating in a public notice and comment period and acquiring party status in an adjudicatory hearing under 310 CMR

[3] M.G.L. c.30A, s. 3 is cited in some statutes as governing the procedures for public notice and comment, suggesting that the proceedings prior to an appeal are more regulatory than adjudicatory in nature. See M.G.L. c. 21, s. 43(4).

1.01(7).[4] The Petitioners acknowledged that the draft approvals subject to public notice and comments were revised to increase the level of protection in the final approvals. See Petitioners Notice of Claim (February 15, 2008). I find no error of fact or law as to the dismissal for lack of standing.

Finally, I grant the request for further extension by the Department and Somerset Power LLC to reflect the administrative appeal period. The date specified in the Final Decision for Special Condition 12 in the Amended Emission Control Plan Final Approval and Special Condition 10 of the Conditional Approval of the Non-Major Comprehensive Plan Application shall be revised from July 6, 2010 to September 30, 2010.

A person who has the right to seek judicial review may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

Laurie Burt
Commissioner

[4] Matter of Riverside, discussed in the briefs and the Recommended Final Decision, does not stand for the proposition that interested persons or groups who participate in public notice and comment procedures before the Department thereby acquire rights to intervene or to appeal. Matter of Riverside Steam and Electric Co., Docket No. 88-132(July15, 1988). In Riverside, the petitions to intervene and to appeal by the citizen group and by the City of Holyoke were supplemented by a notice of claim jointly filed by the citizens and the City of Holyoke. Id. The Administrative Law Judge in Riverside cites for consistency to a prior case involving the Medical Area Total Energy Plant (MATEP), where there were also appeals by a citizen group and a municipality, the Town of Brookline. Id. See Town of Wilmington v. Department of Public Utilities, 340 Mass. 432 (1960). Accordingly, I conclude that the Department is not precluded from granting such motions in appropriate circumstances.